No. 15623

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS J. HILDERBRAND,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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Western District of Washington

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BRIEF OF APPELLEE

JURISDICTION

Appellee accepts appellant's statement of jurisdiction.

RESTATEMENT OF FACTS

The appellant, Francis J. Hilderbrand, was indicted for violation of Title 18 U.S.C. § 1111. He was

charged with the murder of one Robert J. Kelly, on June 15, 1952, at or near St. Joseph's Church, *on the Slater Road*, in the Northern Division of the Western District of Washington, and *on lands* acquired for the use of the United States, and *under the exclusive jurisdiction of the United States*, to-wit, *within the Lummi Indian Reservation* (R. 1, 2). (Italics supplied.)

For the fourth time, the defendant appeals from an order denying his motion to vacate the sentence and commitment entered on August 16, 1952, upon a plea of guilty to the indictment, while represented by counsel and voluntarily made, with full understanding of the nature of the charge (R. 23, 15).

No appeals from the preceding orders denying his petition to vacate were ever perfected. For the first time, after six years of incarceration, the appellant questions the jurisdiction of the court. He was fully represented by experienced and competent counsel in each of his previous endeavors to vacate the sentence and commitment.

The appeal is predicated *upon a question of fact*, to-wit, whether or not the crime committed was "on the Slater Road, . . . *on lands* acquired for the use of the United States, and *under the exclusive jurisdiction of the United States*, to-wit, *within the Lummi Indian Reservation*."

The appellant, in effect, contends that the indictment was defective and did not allege jurisdictional facts.

The appellant nowhere denies that he committed the crime of which here charged; but, for the first time, questions the jurisdiction of the court to try him for the offense; contending that since his plea of guilty, and since his incarceration, he has learned of facts which *might* deprive the federal court of jurisdiction over him.

SUMMARY OF ARGUMENT

The appellant, having plead guilty to the indictment, admitted as true all of the facts therein alleged. The effect of his plea of guilty was to waive, except in very unusual circumstances, all jurisdictional defects. The circumstances of the instant case are not so unusual as to warrant the disturbing of a conviction of guilty.

The judgment of the court carries with it a presumption of regularity. There is nothing whatsoever, in the record before this court on appeal, that could, in any way, indicate that the court lacked jurisdiction to try the accused for the murder of another man on an Indian Reservation. The accused may not, six years following incarceration, collaterally attack

the judgment of the court and try to introduce new facts, which might have influenced the jurisdiction of the court over the crime.

The offense committed was a crime against the United States. The crime was committed within the limits of an Indian Reservation created by Treaty. At the time of the admission of the State of Washington, into the Union, jurisdiction over Indian lands was reserved in the Congress of the United States. The territory occupied by the Lummi Indian reservation, not having been alienated by the United States, remains within the "sole and exclusive" jurisdiction of the United States and the state of Washington has absolutely no jurisdiction over such crimes when committed within the limits of the reservation.

The District Court having jurisdiction over the defendant, properly sentenced him upon the plea of guilty to the indictment.

ARGUMENT

The appellant makes three specifications of error which will now be considered, individually, in the order in which they are presented in appellant's brief.

SPECIFICATION OF ERROR No. 1. The United States District Court did not have jurisdiction over appellant because the indictment failed to allege and

the prosecution failed to establish an element essential to Federal jurisdiction, to-wit, that the crime of murder was committed by or against an Indian ward of the United States.

The Indictment Was Not Defective. If the Indictment Was Defective, Any Defect Was Waived by the Appellant Upon His Plea of Guilty.

A brief consideration of existing law will make it appear conclusively that the indictment was in no way defective and that even if it were defective in any way, such defect was waived by the appellant.

Throughout the discussion of this case it must be borne in mind that the defendant "pleaded guilty" to the offense charged in the indictment; that a trial of the issues was thereby avoided; that certain consequences which cannot be overlooked flow from the action of the appellant. This is not a case in which the jurisdictional facts were tested by a trial on the merits but rest upon an admission of those facts upon a plea of guilty.

If voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defense *known and unknown. Edward* v. *United States*, C.A. D.C., May 9, 1958, 26 L.W. 2575. (Motion under

Title 28 U.S.C. § 2255, claiming inadequate representation by counsel.)

There seems to be little doubt that the plea of guilty in the present case was voluntary. It may be that counsel for the defendant and the defendant himself were then unaware of certain technical defenses which might very well have made the prosecutor's job more difficult if not impossible were he put to the proof, but an awareness of facts which might have changed the picture had they been known to the defendant at the time of his plea comes too late after he elected to throw himself at the mercy of the court upon a plea to second degree murder rather than to risk his life and stand trial on a charge of murder in the first degree.

Upon considering the merits of this appeal — from a denial of the appellant's *fourth* motion under Title 28, U.S.C. § 2255 — one should not lose sight of the fact that nowhere in the records of this case does the appellant assert that he is an innocent man wrongfully convicted. Nowhere does he assert that he did not deliberately kill a fellow human being on June 15, 1952. He pleads, too late, that unknown to him, he *might have been able* to establish that no court had jurisdiction over him and therefore perhaps defeat justice. His chief concern seems to be that he received

thirty-five years rather than an admonition by the court.

A motion under Section 2255, based upon an allegedly defective indictment, may not be used as a collateral attack on a sentence. *United States* v. *Foster*, 7 Cir. 1958, 253 F. 2d 457.

The nature and function of 28 U.S.C. § 2255, is succinctly set forth in a very able discussion of the history and purpose of the act in the case of *United States* v. *Edwards*, D.C. D.C. 1957, 152 F. Supp. 179, wherein Judge Holtzoff observes:

> "It is clear that it was not the intention of the Congress in enacting 28 U.S.C. § 2255, to provide an additional or a supplemental review of convictions in criminal cases. The aim of the legislation was solely to afford a remedy for extraordinary and exceptional situations which previously had been accorded by a writ of *habeas corpus*. The new remedy may not be used to correct errors occurring during the trial even if they relate to constitutional rights.
>
> "*The moving party on a motion under Section 2255 undertakes a heavy burden to overcome the regularity of the conviction.* This is especially true when the attack comes a long time after the event. The motion must present *detailed facts and not merely conclusions of law or fact.* Moreover, statements contained in such a motion, if contradicted by the files or records of the court, need not be taken as true." (Italics supplied.)

The *Edwards* case involved a motion to vacate based upon a contention that the defendant had been

illegally arrested and an unlawful search and seizure made; that there were irregularities in the proceedings before the United States Commissioner following his arrest; and that he had been mentally incompetent at the hearing before the Commissioner. It was held that defendant was entitled to no relief.

Judicial decisions, made in open court, as a result of due process, should not be lightly vacated. *United States* v. *Calp*, D.C. Md. 1949, 83 F. Supp. 152, 156.

Criticism of the wording of an indictment is a matter to be tested by appeal, and not by a motion to vacate a judgment. *Dunn* v. *United States*, 6 Cir. 1956, 234 F. 2d 219, certiorari denied 352 U.S. 899, 1 L.Ed. 2d 90, 77 S.Ct. 140; *United States* v. *Nickerson*, 7 Cir. 1954, 211 F. 2d 909; *Smith* v. *United States*, 10 Cir. 1953, 205 F. 2d 768.

Presumption of Regularity and Burden of Proof.

When collaterally attacked, the judgment of the court carries with it a presumption of regularity. The burden of proof is upon the petitioner to establish his claim by a preponderance of the evidence. *United States* v. *Morgan*, 1954, 346 U.S. 502, 512, 98 L.Ed. 248, 74 S.Ct. 247.

Unless the want of jurisdiction, as to subject matter or parties, appears in some proper form, every intendment must be made in support of the judgment

of a court of that character. *Ex Parte Cuddy*, 1889 131 U.S. 280, 33 L.Ed. 154, 9 S.Ct. 703; *Ex Parte O'Neal*, C.C. N.D. Fla., 1903, 125 Fed. 967, 969.

An indictment, the sufficiency of which is not questioned on the trial, will not be held insufficient on a motion to vacate the judgment entered thereon unless it is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had. *Aaron* v. *United States*, 4 Cir. 1951, 188 F. 2d 446, 447, certiorari denied 341 U.S. 954, 95 L.Ed. 1376, 71 S.Ct. 1006; *Klein* v. *United States*, 7 Cir. 1953, 204 F. 2d 513.

Appellant here seeks by his motion to retry the case on the facts and to raise questions of law which he could have raised on a demurrer to the indictment or on an appeal from his conviction. This he cannot do. *Hilliard* v. *United States*, 4 Cir. 1950, 185 F. 2d 454; *Klein* v. *United States*, *supra*.

Where a motion is made by a prisoner to vacate a judgment seeking relief similar to previous proceedings, it is within the sound discretion of the district court to refuse to consider it, *notwithstanding that it might have been based on new grounds not included in previous motions*. *Dunn* v. *United States*, *supra*; *Moss* v. *United States*, 10 Cir. 1949, 177 F. 2d 438, certiorari denied 339 U.S. 922, 94 L.Ed. 1345, 70 S.Ct. 610;

Bickford v. United States, 9 Cir., 1953, 206 F. 2d 395.

In the latter case this Court observed:

> "This is his third motion on substantially the same grounds.
>
> "Section 2255 provides: 'The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner'."

In some instances, the prior refusal to discharge the prisoner may justify the denial or dismissal of the second or subsequent applications. *United States ex rel. Bowen* v. *Johnston*, D.C. N.D. Cal. 1944, 58 F. Supp. 208 (affirmed without opinion 9 Cir. 1944, 146 F. 2d 268; (certiorari denied 324 U.S. 876, 89 L.Ed. 1428, 65 S.Ct. 1012); *Knight* v. *People*, D.C. N.D. Cal. 1945, 60 F. Supp. 164 (appeal dismissed 9 Cir. 1945, 151 F. 2d 534).

Question of Jurisdiction of Court Should Be Raised at Trial and Not By Motion to Set Aside Judgment and Sentence.

If there was any question as to whether the crime was committed within the jurisdiction of the court, this should have been raised upon trial and decided there. In the absence of *exceptional* circumstances, it may not be raised by motion under Title 28 U.S.C. § 2255, which is available only where the sentence is void or otherwise subject to collateral attack. *Mark-*

ham v. *United States*, 4 Cir. 1954, 215 F. 2d 56, certiorari denied 348 U.S. 939, 99 L.Ed. 735, 75 S.Ct. 360. This case held that on an appeal from an order denying a motion under this section, appellant, who was represented by counsel, having been convicted of murder committed on the Old Army Base in Norfolk, Virginia (Government property which was transferred by the Army to the Navy in 1928 and later transferred from the jurisdiction of the Navy to that of the Maritime Commission), — no question being raised on the trial as to the jurisdiction of the court to punish the crime, — could not raise, by collateral attack, the issue of fact giving the court jurisdiction.

If the petitioner desires to raise them, questions involving errors either of law or of fact, must be raised by timely appeal from the sentence. *Taylor* v. *United States*, 4 Cir. 1949, 177 F. 2d 194.

Appellee does not agree with the view of appellant that "It is quite clear that state courts and not federal courts have jurisdiction where a non-Indian murders a non-Indian within the confines of an Indian reservation." (Appellant's Brief, p. 5) A full discussion of the jurisdiction of the court in cases involving both Indians and non-Indians is set forth in appellee's discussion of the appellant's second assignment of error.

The indictment, on its face, alleges that a crime

has been committeed in violation of the provisions of Title 18 U.S.C. § 1111 and that defendant commited it. It is sufficient if the crime is charged substantially in the language of the statute. The indictment is good if it states facts sufficient to inform the defendant of the offense. Under Rule 7 of the Federal Rules of Criminal Procedure it is only necessary to charge the offense in the language of the statute so as to put a defendant on notice of the accusation against him. *Lynch* v. *United States*, 5 Cir. 1951, 189 F. 2d 476, certiorari denied 342 U.S. 831, 96 L.Ed. 629, 72 S.Ct. 50.

In *Hagner* v. *United States*, 285 U.S. 427, 431, 76 L.Ed. 861, 52 S.Ct. 417, it is said:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' (Citing cases.)"

Appellant contends that if permitted he *may* be able to establish that neither he nor his victim was an

Indian and that the crime was not committed on land within the exclusive jurisdiction of the United States. However, it must be remembered that in the simple language of the indictment, the crime in question was committed not in, or on land belonging to St. Joseph's Church, and not on land *outside* the limits of the Lummi Indian Reservation, but rather was committed "on the Slater Road, . . . on land acquired for the use of the United States, and under the exclusive jurisdiction of the United States, to-wit, *within the Lummi Indian Reservation.*"

Upon proper grammatical construction, the phrase "at or near St. Joseph's Church" modifies the phrase "on the Slater Road", and not vice versa. Thus, the crime to which appellant pleaded guilty, and thereby admitted the facts alleged in the indictment, was committed "on lands acquired for the use of the United States, and under the exclusive jurisdiction of the United States," within the purview of Title 18 U.S.C. § 7 (3) extending the territorial jurisdiction of the United States to "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," and on land defined as "Indian country" as set forth in Title 18 U.S.C. § 1151.

Whether the appellant was an Indian or a non-

Indian, enrolled or emancipated, made no difference since he came under the jurisdiction of the district court in any event.

Whether the crime was committed on fee land or on the Slater Road makes no difference now because he has admitted the jurisdictional fact by his plea of guilty.

Whether there might have been any defect in the indictment makes no difference because he has cured any defect by his admission of guilt and failure to demur to the indictment. Had he demurred, any defect would have been remedied by a new indictment. Had he stood trial, he might not have been present today to question the validity of the indictment.

SPECIFICATION OF ERROR No. 2: The crime of which appellant was convicted was not within the jurisdiction of the United States District Court because it was not committed on lands under the exclusive jurisdiction of the United States.

Whether the victim was killed on land under the exclusive jurisdiction of the United States is a question of fact determined, once and for all, by the plea of the defendant. There is nothing in the record before the court to establish that the crime was committed on private land owned by the Catholic Church.

Even though the victim may have been assaulted on fee land, it is apparent from the face of the indictment that the victim was killed within the limits of the Lummi Indian Reservation; consequently, the question resolves itself to the issue of whether or not the district court has jurisdiction to try a non-Indian for a crime committed within the limits of an Indian reservation.

The crime of which the appellant was convicted was within the jurisdiction of the United States District Court whether the defendant was an emancipated Indian or a person other than an Indian.

Since the crime charged was not one of the offenses enumerated in Title 18, U.S.C. §§ 1152, 1153, and 3242, no discussion will be made as to what the jurisdiction of the court would have been had the indictment charged an offense by an Indian against another Indian or any crime involving an enrolled Indian.

Jurisdiction, if any, rests on the charge in the indictment, to-wit, a violation of Title 18 U.S.C. § 1111, with its corollary sections, 7, and 1151, 3231, of Title 18.

In considering whether or not the United States has jurisdiction over a crime committed on land within a reservation or upon land that originally constituted a part or parcel of a reservation but has been

patented, consideration must be given to the following factors, all of which play their own peculiar role in the over-all picture:

1. Was the state one of the original states?

2. Was the state originally a territory and created by an enabling act? What are the terms of the enabling act?

3. Were the reservations created by a treaty with the Indians before or after the state came into the Union?

4. What reservations, if any, as to jurisdiction of the United States were contained in the treaty, enabling act constitution?

5. Did the United States by special act of Congress deprive itself of jurisdiction over a particular reservation?

6. If the crime was committed on allotted land, did the patent issue under the terms of the General Allotment Act or under a particular treaty?

7. Were either of the parties enrolled Indians?

General jurisdiction of the district court is conferred by Title 18 U.S.C. § 3231:

"The district courts of the United States shall

have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Murder is declared to be a crime against the United States by Title 18 U.S.C. § 1111:

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every . . . deliberate, malicious, and premeditated killing . . . is murder in the first degree.

"Any other murder is murder in the second degree.

"(b) Within the special maritime and territorial jurisdiction of the United States,

"Whoever is guilt of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life;

"Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

The special maritime and territorial jurisdiction of the United States is defined in Title 18 U.S.C. § 7 as

"(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . ."

The general laws of the United States are extended to the Indian country by Title 18 U.S.C. § 1152, which provides:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Indian country is defined in Title 18 U.S.C. § 1151 as

> " . . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent*, and including rights-of-way running through the reservation . . . ."
>
> (Italics supplied.)

The Lummi Indian Reservation was created by the Point Elliott Treaty of January 22, 1855 (12 Stat. 927), Article II, providing, in part, as follows:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz (here follows the area reserved) . . . ."

It provides that lots may be assigned to individuals under Article VII thereof,

> "The President may hereafter . . . cause the whole or any portion of the lands *hereby reserved* . . . to be surveyed into lots, and assign the same to individuals or families . . . subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same way be applicable . . . ."

The applicable provisions of the Treaty with the

Omahas, 1854, 10 Stat. 1043, of March 16, states:

> ". . . conditioned that the tract shall not be aliened or leased for a longer term than two years . . . until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. . . . No State legislature shall remove the restriction herein provided for, without the consent of Congress."

The Enabling Act under which the State of Washington was created, 25 Stat. 676, provides in part as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana and *Washington*, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.
>
> * * * * * * * * * * *
>
> "Sec. 4. Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control*

of the Congress of the United States; . . ." (Italics supplied.)

The Constitution of the State of Washington provides:

"ARTICLE XXVI

"COMPACT WITH THE UNITED STATES

"The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

* * * * * * * * * * *

"Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits *owned or held by* any Indian or *Indian tribes;* and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . .*" (Italics supplied)

That the State of Washington was never granted jurisdiction over Indian reservations existing at the time of the enactment of the Enabling Act was further made manifest by Artice XXVI of the Constitution of the State of Washington, supra, ratified by the people at an election held on October 1, 1889, at which time the very words of the Enabling Act itself were adopted by the people,

> ". . . . and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . ."

It would be difficult to find more explicit language to establish the jurisdiction of the courts of the United States over crimes committed on Indian reservations than this language contained in both the Enabling Act and the Constitution of the people of the State of Washington. Despite an extensive search, appellee has not been able to find any Congressional legislation since 1889 abrogating the powers reserved to the Congress of the United States over Indian lands in the State of Washington.

The Lummi Indian Reservation constituted such Indian lands, having been created by the Treaty of Point Elliott January 22, 1855 (12 Stat. 927). Other than an occasional allotment to Indians provided for in the Treaty, the Reservation is still intact.

The case closest in point is the case of *Brown* v. *United States*, 8 Cir. 1906, 146 Fed. 975, involving a writ of error to the Supreme Court of the Territory of Oklahoma. Judgment of conviction was affirmed. In the *Brown* case, the plaintiffs in error were convicted in the district court of Pawnee County, while this court was exercising the jurisdiction of the circuit and district courts of the United States, of the larceny of a horse in the Osage Indian Reservation, which is within

that territory and was attached to Pawnee County for judicial purposes. The issue was whether larceny committed in an Indian reservation in the Territory, by one not an Indian, was a crime against the laws of the United States and cognizable by the district court of the territory while exercising the jurisdiction vested in the Circuit and District courts of the United States. The defense presented was that the crime was an offense against the laws of the Territory and not against the laws of the United States. The Court discusses the application of the general statutes of the United States heretofore cited as supporting the basis for the jurisdiction of the District Court in the instant case, the Court holding at page 977:

> ". . . the offense of which the plaintiffs in error were convicted was one against the laws of the United States and therefore was properly cognizable on the federal side of the district court."

The Court in its discussion, at page 977, distinguishes the *McBratney* and *Draper* cases as follows:

> ". . . they relate to crimes committed in a sovereign state the admission of which into the Union, *without any exception with respect to the Indian reservations therein or the jurisdiction over them,* removed those reservations from the plenary authority of the United States by reason of the constitutional rule of equality in respect of statehood." (Italics supplied)

The next case in point is that of *Ex Parte Wilson*, 1891, 140 U.S. 575, 35 L.Ed. 513, 11 S.Ct. 870, holding that the district courts of a territory sitting as a court of the United States had jurisdiction over the crime of murder *committed by a person other than an Indian* upon an Indian reservation within its territorial limits. This case was heard by the Supreme Court of the United States upon a petition for a writ of habeas corpus denying the validity of a sentence of death made by the District Court of the Second Judicial District of the Territory of Arizona, for the crime of murder committed within the White Mountain Indian Reservation. Application denied.

The petitioner alleged that since both parties involved were Negroes, the territorial court, sitting as a court of the United States, did not have jurisdiction over him. Unlike the instant case, the White Mountain Indian Reservation had not been constituted at the time Arizona was organized but was created by order of the President in 1871. By Act of Congress of February 14, 1887 (24 Stat. 388), the creation of the Reservation by the President was confirmed by legislative recognition. The court ruled that since Section 2145 of the Revised Statutes extends to the Indian country the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United

States, except as to crimes the punishment of which is otherwise expressly provided for, the Indian reservation being considered a part of the Indian country, the words "sole and exclusive" as used in the Act describe the laws which are extended to the Indian country [further extended by Section 1151 to "within the limits of any Indian reservation" to avoid conflicts which arose].

The Wilson case was approved in *In re Ingram*, 1902, 12 Okla. 54, 55, 69 Pac. 868, 869, and *Goodson* v. *United States*, 1898, 7 Okla. 117, 123, 54 Pac. 423, 425, both holding Osage Indian Reservation to be in Indian country.

Most of the cases cited in Rose's Notes involves the situation where one of the parties, either the accused or the victim, was an enrolled Indian and would fall under the application of another statute. However, it should be noted here that had the instant case gone to trial and had the facts established that the accused was an Indian, the indictment, regardless of the terminology used therein, would have been sufficient to charge a crime under Title 18 U.S.C. §§ 1153 and 3242, as well, and the cases cited, i.e., *United States* v. *Pelican*, 1914, 232 U.S., 442, 445, 58 L.Ed. 676, 677, 34 S.Ct. 396; *Donnelly* v. *United States*, 1913, 228 U.S.

243, 256, 57 L.Ed. 820, 826, 33 S.Ct. 449, etc., would have been applicable.

Since the *Wilson* case was heard by the highest court of the land, the principles of law established therein are binding upon all courts. The Supreme Court has not seen fit to reverse its ruling. Unless there is something in the Enabling Act under which Washington became a state, contrary to the legal principles announced therein, the law is still binding upon the facts of the instant case.

The Enabling Act under which the State of Washington was created, page 19, *supra*, has never been repealed and has only once been amended. Section 11, referring to school lands, was amended by the Congress in 47 Stat. 150; however, the proviso set forth in Section 4, Second Article,

> ". . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ."

has never been changed since its creation in 1889.

Appellant relies quite heavily on the case of *New York ex rel. Ray* v. *Martin*, 1945, 326 U.S. 496. This case involves the question of federal jurisdiction over a crime committed within the city of Salamanca, a city of 9,000 population, situated within the limits of the Allegany Reservation, the city having only eight

Indian families. The court ruled that the case fell within the rule announced in the case of *United States* v. *McBratney*, 104 U.S. 621; however, it must be remembered that the State of New York was one of the original thirteen states and in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. With that rule we have no quarrel.

No enabling legislation reserved jurisdiction in the Indian lands to the United States. No conconstitutional provision by the people of New York reserved jurisdiction over such lands "to the control of the Congress of the United States." In fact, Congress had by virtue of Section 7 of the Act of 1875, 18 Stat. 330 granted specific jurisdiction over the village of Salamanca to the State of New York.

United States v. *McBratney*, 1882, 104 U.S. 621, 26 L.Ed. 869, was heard by the Supreme Court upon a certificate of division of opinion from the Circuit Court of the United States. This case is likewise distinguishable from the instant case because of the following language of the Court found at pages 623-624:

> "If this provision of the 1st section [of the Act of Congress of February 28, 1861] had remained in force after Colorado became a State, this indictment might doubtless, have been maintained

in the Circuit Court of the United States. (Citing cases.)

"But the Act of Congress of March 3, 1875, for the admission of Colorado into the Union . . . contains no exception of the Ute Reservation or of jurisdiction over it. 185 Stat. at L. 474. . . .

"The Act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing Treaty which are clearly inconsistent therewith. . . . The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, *without any such exception* as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States." (Italics supplied.)

The case of *Draper* v. *United States*, 1896, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107, and similar cases are not in point because they relate to crimes committed in a sovereign state, the admission of which when made without any exception with respect to the Indian reservations therein or the jurisdiction over them — removed those reservations from the plenary authority of the United States by reason of the constitutional rule of equality in respect of statehood. *Brown* v. *United States*, 8 Cir. 1906, 146 Fed. 975.

The case of *State* v. *Howard*, 1903, 33 Wash. 250,

74 Pac. 382, on first examination, would appear to support the proposition of the appellant that the State of Washington has jurisdiction over a crime committed upon an Indian reservation by either an emancipated Indian or a person other than an enrolled tribal Indian; however, an examination of the case shows that, as sometimes happens, the court's discussion goes beyond the scope of the matters under consideration. The crime involved in that case was committed by a member of the Puyallup Tribe of Indians. The crime was committed in Pierce County, Washington, the area in which the Puyallup Reservation was located. To put the case, and its holdings, in the proper perspective, it is necessary to examine the holding of the court in the case of *State* v. *Smokalem*, 1905, 37 Wash. 91, 79 Pac. 603, a later case, wherein it is observed at pages 93 - 94:

> "In 1883 or 1884 the lands of this reservation were *allotted to the Indians in severalty*, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, *all restrictions against the alienation* of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor cus-

> toms . . . The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

Under the special situation of the Puyallup Indians it would appear the United States had almost entirely relinquished jurisdiction over the Puyallup Reservation. These two cases can thus be distinguished because the reservation in question, to-wit, the Puyallup Indian Reservation, was not an Indian reservation of the same type as the Lummi Indian Reservation, since all of the lands, except a small strip along the Puyallup River had been alienated.

It is submitted that the attention of the Supreme Court of the State of Washington was not invited to the reservation of jurisdiction by the United States as expressed in the Enabling Act and in the Constitution of the State of Washington; nor was the attention of the court invited to the case of *Ex Parte Wilson, supra.* Not having considered these matters, the court fell into error. It further appears that the crimes involved in the *Howard* and *Smokalem* cases occurred on alloted lands, and were heard prior to the amendment of Title 18, U.S.C. 1151.

Much confusion existed prior to the amendment of Title 18 U.S.C. § 1151. This confusion was, however, resolved by the use of the words "(a) all lands within the limits of any Indian reservation of the United States government, notwithstanding the issuance of any patent, . . ."

SPECIFICATION OF ERROR No. 3: This case should be remanded to the United States District Court for the Western District of Washington, Northern Division, and appellant should be permitted to amend his motion in order to allege additional facts supporting his contention that the crime of which he was convicted was not within the jurisdiction of a United States District Court.

Since the appellant's third specification of error is dependent upon the validity of his first and second specifications of error, and actually constitutes merely a prayer for relief, no discussion will be made of the third specification of error, other than to observe that appellant seeks to close the barn door after the horse has been stolen. He now seeks an opportunity to present facts which should have been presented by a demurrer to the indictment or at a trial on the merits. There is no showing of newly discovered evidence which would establish his innocence nor of any facts which would indicate that justice has gone awry. It is merely a claim based on speculation and conjecture.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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